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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLANT.

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(2) The Court erred in holding that § 871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code 20

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(4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943..... 30

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BRIEF OF APPELLANT.

OPINIONS OF THE COURT BELOW.

The interlocutory opinion in the court below, the Supreme Court of Ohio, upon motion treated as a general demurrer to the petition, is officially reported in 142 O. S. 439 and is reprinted in the Record. (R. 12.) The prevailing and dissenting opinions on final judgment, on general demurrer to the petition and amendment to petition, are officially reported in 143 O. S. 591 and 596 respectively, and are reprinted in the Record. (R. pp. 23, 28.)

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked primarily upon appeal, under U. S. C., Title 28, §§ 344(a) and 861a, upon the ground that the Workmen's Compensation Act of Ohio was, by the Supreme Court of Ohio, necessarily held valid and not repugnant to the Constitution of the United States, although so construed and applied that appellant was thereby deprived of property without due process of law and was denied the equal protection of the laws.

By its decision, the Supreme Court of Ohio so construed and applied the Workmen's Compensation Act that

(a) Orders of the Industrial Commission awarding workmen's compensation for injuries and deaths of employes of appellant are final even though such injuries and the injuries resulting in such deaths did not occur in the course of and did not arise out of the employment, the claims were not compensable, and the Commission had no jurisdiction to allow them;

(b) Appellant, an employer contributing to the state insurance fund under the Workmen's Compensation Act, is not afforded a judicial hearing upon, review of, or other attack against such claims or orders, even though they are beyond the jurisdiction of the Industrial Commission, are not supported by any evidence but are contrary to the uncontroverted evidence before the Commission, and are otherwise unlawful;

(c) By the rules and formulae duly established by the Industrial Commission for the classification and rating of occupations or industries with respect to hazards, and for the determination of risks and fixing of rates of premium and merit rating, the amounts of all awards of compensation are included as a factor in the computation of the rates and amounts of premiums required to be paid by contributing employers during the ensuing period of five years; and by reason of the holding that the appellant is not entitled to a judicial hearing upon, review of, or other relief against the illegal awards beyond the jurisdiction of the commission, appellant will be required to pay increased premiums for workmen's compensation over a period of five years to an extent not presently ascertainable but aggregating over $20,000.00 additional in the year 1943;

(d) The Act affords a hearing and review by appeal to employes upon orders denying claims for compensation; and it affords to employers qualified as self-insurers under the Act and to employers who, in violation of the Act, neither qualify as self-insurers nor contribute to the state insurance fund, a judicial hearing upon and review of the lawfulness of such orders upon the ground that they are beyond the jurisdiction of the Industrial Commission, or any other

legal ground, by simply refusing to pay the unlawful award and setting up the illegality of the order in a suit for collection of the award; this is not available to contributing employers since awards to their employes are paid from the state insurance fund and although they are adversely affected in equal degree (in the case of appellant the increased premiums assessed against it will probably exceed the amounts awarded) they have no remedy and are thereby denied the equal protection of the laws.

The Dissenting Opinion below recognized the constitutional questions saying (R. 30):

> "In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?"

In addition to the right of appeal, jurisdiction of this Court is invoked under the provisions for certiorari, U. S. C. Title 28, § 344(b), (c), upon the ground that by the Workmen's Compensation Act of Ohio, the orders of the Industrial Commission and the decision and judgment of the Supreme Court, the State of Ohio has deprived appellant of property without due process of law and has denied it the equal protection of the laws.

For a more complete statement reference is made to the Statement in Support of Jurisdiction filed in the Supreme Court of Ohio, and separately printed here.

STATEMENT OF THE CASE.

The case originated by petition filed in the Supreme Court of Ohio wherein appellant sought review either under favor of Section 871-38 of the General Code of Ohio or by prohibition, mandamus, or otherwise, of six several orders of the Industrial Commission of Ohio awarding workmen's compensation for deaths of two and injuries sustained by four employes of appellant, upon the ground

that such orders were unreasonable, unlawful, beyond the jurisdiction of appellee, and constituted a gross abuse of discretion upon its part. The case was first submitted upon a motion to the petition (R. 8), which was treated as a general demurrer and sustained. (R. 45.) Thereafter, appellant filed an amendment to the petition (R. 20), and on demurrer to the petition and amendment (R. 23), final judgment (R. 46) was rendered for appellee. The facts are alleged in the petition (R. 1) and amendment to petition. (R. 20.)

The collision, out of which the injuries and deaths resulting in the claims involved herein arose, did not occur during the time or in the place or zone of employment of the injured or deceased men, or any of them, nor was such employment the direct or proximate cause thereof. (Amendment to Petition, R. 21.)

The collision occurred upon a grade crossing upon the property of The Baltimore & Ohio Railroad Company, and a road upon which the public were free to, and did freely, travel and over which appellant exercised no control whatsoever. The means of egress was freely chosen by the men involved; other means of egress were available and were used by others of appellant's employes.

The collision occurred on the morning of November 13, 1941 while the injured and deceased men were on their way home, after completing their day's work. They had left appellant's plant, entered the automobile and driven to the crossing, at least one thousand feet outside the gate of appellant's plant. The hazards at the crossing involved herein were much less than at other crossings commonly traversed by the public, including those which it was necessary for these employes to cross on their way to and from their homes and work, and also those which it was necessary for men living in the same general locality, and employed at other plants in and near the City of Warren, to cross in going to and from their homes and work. The view of the train, approaching

for more than one thousand feet from the crossing, was clear and unobstructed to the injured and deceased men over the entire distance traveled by them; they actually saw it and warned and requested the driver to stop, but he wilfully drove around another car, which had stopped to permit the train to pass, and into collision with the train. The collision, injuries, and deaths did not arise in the course or out of the employment of the injured and deceased men; the contrary findings of the Industrial Commission were not supported by any evidence, but were against the uncontroverted evidence before the Commission (Petition, R. 6); and the claims were not in law compensable.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

Appellant adopts its Assignment of Errors (R. 39) to the same extent as though fully repeated herein, and specifies all of such assigned errors as those intended to be urged herein. They are printed as captions to the several divisions of the Argument.

SUMMARY OF WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act of Ohio is authorized by Article II, Section 35 of the Ohio Constitution.

The Act as originally adopted in 1912 was optional but is now compulsory on substantially all employers having three or more persons in their employ. It was originally administered by the State Liability Board of Awards, superseded by the Industrial Commission under the Industrial Commission Act, so-called, passed in 1913.

The Industrial Commission classifies occupations and industries with respect to their degree of hazard, determines the risks of the different classes and fixes rates of premiums for the several risks, based upon total payroll in each of the classes of occupation or industry, or other basis consistent with insurance principles, to maintain a state insurance fund and surplus for the benefit of employes in-

jured and dependents of employes killed in the course of employment. It also is authorized to adopt a system for the merit rating of employers upon the basis of their individual industrial accident experience and has done so. Rates are revised annually in accordance with the latest five calendar years' experience.

Every employer subject to the Act is required either to pay semi-annual premiums based upon payroll into the state insurance fund or to qualify as a self-insuring employer, in which case it is required to pay into the state insurance fund only such amounts as are required to be credited to surplus.

Employes injured and dependents of those killed in the course of employment are entitled to workmen's compensation including medical, hospital, funeral and similar expenses, payable from the state insurance fund in the case of contributing employers and directly by self-insuring employers.

Employers complying with the Act are not liable at common law or by statute for injuries or deaths of their employees. Employers who fail to comply with the Act are not entitled to the benefits of the Act, are liable to suit at common law for injuries or death sustained in the course of employment and may not avail themselves of the common law defenses of the fellow-servant rule, assumption of risk or contributory negligence, and together with their officers are liable to penalty by way of fine and imprisonment therefor. Nevertheless employees of non-complying employers may elect to file claim for workmen's compensation and if compensation is awarded thereon the employer is required to pay it or furnish bond and if unpaid the claim is certified to the Attorney General for suit against the employer. The same Section provides for similar suit against a self-insuring employer who for any reason fails to pay compensation awarded to its employe by order of the Commission.

If the Commission finds that any employer subject to the Act has failed to comply therewith proceedings are provided for the assessment of premiums for the time during which the employer has been subject to the Act and if the premiums assessed are not paid within ten days after notice the Commission certifies its determination to the Attorney General who is required to file a civil act for collection of the premium. Unless the employer within ten days execute bond to the State in double the amount so found the court is required to appoint a receiver for the property and business of the employer. A similar procedure is provided for the case of an employer who has complied with the Act and thereafter defaulted in any payment required to be made to the state insurance fund for a period of ten days.

The Industrial Commission is granted full power and authority to hear and determine all questions within its jurisdiction and its decisions thereon are declared to be final except that upon denial of claim for compensation upon the ground that the injury did not arise in the course or out of the employment or other specified grounds the Claimant may demand a rehearing which is then required; if his claim be denied upon rehearing he may appeal to the Common Pleas Court of the county in which the injury occurred or, if it occurred outside the state, the county in which the contract of employment was entered into. The defendant is the Industrial Commission in the case of a contributing employer or the employer itself in the case of a self-insuring employer.

SUMMARY OF ARGUMENT.

The court below erroneously held that when a claim for workmen's compensation is allowed the action of the Industrial Commission is final and that employers cannot appeal from the order of allowance, thereby misconstruing the first sentence of G. C. § 1465-90 under which such final-

ity is accorded only to decisions upon questions "within its jurisdiction." The jurisdiction of the Commission to award compensation for injuries and deaths of employes extends only to those arising in the course of employment, which includes the qualification that they must also have arisen out of the employment, i.e., there must be a causal connection between the employment and the injury or death.

The question whether the injury or death involved in a claim for compensation arose in the course and out of the employment is jurisdictional. Administrative orders unsupported by evidence showing the facts required by the statute as a basis for the orders are beyond the power and jurisdiction of the Commission, as are the orders involved herein; indeed these orders were contrary to the uncontroverted evidence before the Commission. The inquiry whether an order is reasonable and in conformity to law and whether supported by any evidence is judicial in character and a judicial hearing or review before a court must be afforded at some stage of the proceedings.

The enabling provision of the Constitution upon which the Workmen's Compensation Act is based accords finality to decisions of the Commission only upon question whether an injury, disease, or death resulted because of the failure of the employer to comply with a specific safety requirement. The courts have always heretofore recognized that on matters of jurisdiction and other legal questions the orders of the Commission are subject to review in some form. Appellant herein being held by the court below to have been neither a necessary or a proper party to the claim proceedings before the Industrial Commission and being denied any remedy against the awards, has been denied any hearing, judicial or otherwise.

The Legislature of Ohio clearly intended to provide for review of orders of the Industrial Commission on questions of law or the reasonableness of the order but through an anomaly in the development of the decisions this right

has been construed away. Direct review by petition in the Supreme Court was provided not in the Workmen's Compensation Act but in the Industrial Commission Act adopted in the following year under which the Industrial Commission was constituted, and superseded the State Liability Board of Awards with all powers and authority formerly exercised by the latter under the Workmen's Compensation Act.

In the earlier cases there were other available specific remedies and in such cases the general provision for review of orders of the Commission was held applicable only to orders entered under the preceding sections of the Act, particularly the safety code, so called, overlooking entirely the provision of another preceding section whereby the Industrial Commission was invested with and exercises power under the Workmen's Compensation Act. In one case the court actually reviewed and set aside an order of the Commission awarding compensation, but justified it upon the fallacy that it was reviewing an order establishing the safety requirement upon which the award was based rather than the order awarding compensation. Actually it had no jurisdiction to review such order because of the passage of time within which petition for review thereof might be filed.

Specific provision is made in G. C. § 1465-90 for appeal by the Claimant, and relief is available to employers who either are qualified as self-insurers, or violate the Compensation Act by failure to comply, or those against whom awards of additional compensation for violation of a safety requirement are made—cases in which the compensation is not paid from the State Insurance Fund but is required to be paid by the employer, and in which the employer may refuse to pay and upon suit therefor defend upon any legal ground.

Since the Workmen's Compensation Act nowhere provides any method of review or remedy for the contributing

employer and since the review provided in the Industrial Commission Act has been held inapplicable to orders awarding compensation, Appellant had no remedy in the ordinary course of law and the only available relief is the extraordinary remedy of prohibition or mandamus. Prohibition is available to prevent an inferior tribunal possessing judicial or quasi-judicial powers from exceeding its lawful powers even when it rightfully entertains jurisdiction in the first instance. Prohibition has been granted to prevent allowance by the Commission of a claim barred by election to sue for damages at common law. The court below skirted this question by saying that prohibition will not issue to prevent the Industrial Commission from carrying out a lawful or valid award of compensation pursuant to G. C. § 1465-90. Likewise mandamus lies to compel the performance of a clear legal duty. It was the clear legal duty of the Commission to disallow these claims and having allowed them to vacate its orders.

Here then is a typical case to which the authors of the Constitution intended the due process clause to apply. The Ohio Courts clearly have heretofore recognized that a denial of judicial hearing on questions of law would deprive the employer of property without due process of law but in all such cases another form of remedy was available. Here the denial of any judicial hearing results in a substantial monetary damage. Although the contributing employer has no direct legal property interest in the State Insurance Fund it contributes semi-annual premiums thereto, in the computation of which all losses are included, thereby increasing the premiums payable during the period of five years succeeding any award. Likewise the losses are included in the computation of the merit rating of the individual employer. Consequently if the Appellant be denied any remedy against the unlawful orders involved it will be damaged to the extent of the increased premiums resulting from the increased rates and the adverse effect on

its merit rating due to the inclusion in the computation of awards for claims beyond the jurisdiction of the Commission. The total effect is not ascertainable in advance by reason of other factors, such as increasing payrolls, but for the year 1943 the increase in premiums resulting from the orders complained of aggregated $20,018.62.

No fault can be found with the rules and formulae adopted by the Commission for classification and rating of risks, determination of premiums and merit rating; therefore it would be futile to refrain from attack upon the unlawful orders but to wait and make collateral attack upon the orders fixing rates, determining merit ratings and assessing premiums. To default in the payment of premiums would subject the employer to hazards and penalties so severe that no responsible employer would consider it; that course of action would be illusory and the contributing employer would still be denied due process.

While the contributing employer has no legal interest in the State Insurance Fund it has a decided interest in the distribution of that fund since the amount of premiums which it contributes to the fund in the future are directly dependent upon the amount of awards payable to its employes from the fund. It is not necessary that there be a legal interest in the fund since the operative effect of such awards is to deprive it of property without due process of law and of the equal protection of the laws.

Self-insuring employers are required to pay awards of compensation direct to their employees injured in the course of employment; if an injured employee of a non-complying employer elects to claim compensation, an award therefor is payable by the employer direct. Consequently if the Commission exceeds its jurisdiction or the award be otherwise unlawful or unreasonable the employer may refuse to pay, compelling the Attorney General to sue therefor, and may defend upon any legal ground. On the other hand in the case of the contributing employer, as here in-

volved, the award is paid from the state insurance fund over which he has no control; consequently he does not have the remedy afforded the self-insuring employer and the employer violating the Act. He is accordingly denied the protection afforded by the law to employers of the other classes and to the employe who is given a specific right of rehearing and appeal upon denial of a claim upon any of a number of specified grounds.

By reason of the foregoing the court below erred in its final judgment sustaining the demurrer, denying a hearing upon the merits and entering judgment for Appellee. The dissenting opinion below (Rec. 28-34) clearly points out that the effect of that Court's orders is to deny to Appellant due process of law and the equal protection of the laws.

Irrespective of the necessary effect of the judgment below as holding the Workmen's Compensation Act valid and not repugnant to the Constitution of the United States, the decision and judgment of the court and the orders of the Commission deprived Appellant of its property without due process of law and denied the equal protection of the laws.

SPECIFICATION OF ERRORS URGED AND ARGUMENT.

(1) The Court erred in holding valid and not repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution the provision of the Workmen's Compensation Act (G. C. § 1465-90) that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries and deaths of employes shall be final except that claimants may appeal from denial of such claims on grounds stated therein.

By its terms, the Workmen's Compensation Act provides that the Industrial Commission shall have full power and authority to hear and determine all questions within

its jurisdiction and that its decisions thereon shall be final, except that claimants are entitled to rehearing and appeal from denial of such claims on grounds stated therein. (G. C. § 1465-90, *post*, p. 58.)

The Supreme Court of Ohio, in its interlocutory opinion herein, (142 O. S. 439, 441—R. 14), held that when a claim is allowed, the action of the Commission is final and in that event the complying employer can not appeal from the order of allowance. The court thereby misconstrued the first sentence of G. C. § 1465-90 under which finality is accorded only to decisions on questions *within its jurisdiction.*

The jurisdiction of the Commission to award compensation for injuries and deaths extends only to claims where the injuries, or death, arise in the course of employment. Ohio Constitution, Article II, Section 35 (*post*, p. 45); G. C. § 1465-68 (*post*, p. 49); G. C. § 1465-72 (*post*, p. 53). The phrase "in the course of employment" has been construed as requiring also that the injury or death "arise out of" the employment in order to be compensable. 42 *O. Jur.* 627:

> "* * * It is also required that the injury, casualty, or disease have some causal connection with the employment, either through its activities, its conditions, or its environment, it being established that the provisions of the statute do not cover an injury which has its cause entirely outside of and disconnected with the business in which the injured workman is employed. * * *"

Fassig v. State ex rel., 95 O. S. 232, 246:

> "Much that has been already said applies with equal force to the remaining claims of plaintiff in error that the section in question denies to the employer in question the due process of law and the equal protection of the law, in violation of the provisions of the state and federal constitutions referred to.
>
> An additional objection is made against the validity of Section 27. It is said that the provision with

reference to an injury 'in the course of employment' permits an award to be made to one whose injury did not arise out of the employment. We do not think this contention is well taken. The language is found in the constitutional amendment as well as in the statute. It was plainly the intention of the framers of the amendment and of the statute to provide for compensation only to one whose injury was the result of or connected with the employment and would not cover any case which had its cause outside of and disconnected with the employment, although the employe may at the time have been actually engaged in doing the work of his employer in the usual way."

Highway Oil Company v. State ex rel., 130 O. S. 175, 178, 179:

> [p. 178] "This court has often interpreted the phrase 'in the course of employment' as used in the Constitution and statutes, and has consistently held that it refers only to an injury which is the result of or arises out of the employment. No injury having its cause outside of and disconnected with the employment is contemplated, even though the employe at the time may be engaged in the work of his employer in the usual way."
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> * * * * *
>
> [p. 179] * * * "But it [the course of employment] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood."

On page 180 the Court quoted with approval from *Vincennes Bridge Co. v. Industrial Commission*, 351 Ill. 444, 184 N. E. 603:

> "* * * there must be a proximately causative relation between the nature of his work and the injury * * *."

Accordingly we start with the general principle that injuries and death are not compensable: (a) unless they are occasioned in the course of employment, i.e., during the time and in the place where the workman is employed, and (b) unless they arise out of the employment, i.e., are caused by a hazard created or increased by the employment itself. The court below rode roughshod over this requirement, saying that it is inconsequential or immaterial whether the injuries and deaths were compensable or not (142 O. S. 441, 444; 143 O. S. 591, 595, R. pp. 14, 17, 27), thereby disregarding the essential elements of jurisdiction of the Commission under G. C. § 1465-90.

The question whether the injury or death arose in the course and out of the employment is jurisdictional. *State, ex rel. Butram v. Industrial Commission*, 124 O. S. 589, 593; *State, ex rel. Randolph v. Industrial Commission*, 128 O. S. 27, 30; *Humphries v. Steel Corporation*, 132 O. S. 263, 270.

Administrative orders unsupported by evidence showing the facts required by the statute as a basis for the order are beyond the power and jurisdiction of the Commission. *Hawkins v. Bleakley*, 243 U. S. 210, 215 (involving a Workmen's Compensation Act under which the Supreme Court of Iowa had held there was a right to judicial review except on questions of fact); *Waite v. Macy*, 246 U. S. 606; *Federal Radio Com. v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *U. S. v. Abilene & S. Ry. Co.*, 265 U. S. 274; *Crowell v. Benson*, 285 U. S. 22, 48, 50.

It is alleged in the petition below (R. 6) that the collision which resulted in the injuries and deaths involved in these claims did not arise in the course of or out of the employment of any of the employes and had no causal (misspelled "casual" in printed record) relation thereto; and further that the finding in each of the orders of which review was sought, that the employe's injury was sustained in the course of his employment, is not supported by any

evidence but is contrary to the uncontroverted evidence before the Commission. In addition, specific facts were alleged in the petition and the amendment to the petition, showing that the injuries and deaths did not arise in the course of or out of the employment and these facts are of course admitted by demurrer. The dissenting judges in the court below (143 O. S. 596, 603, R. 34) said:

> "In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums."

An inquiry as to whether an order is reasonable and in conformity to law or whether it is supported by any evidence is judicial in character and judicial hearing before a court must be afforded. *Fed. Radio Com. v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *Public Service Com. v. Havemeyer*, 296 U. S. 506. The legislature cannot confer on tribunals other than courts powers which are strictly and conclusively judicial. *Fassig v. State ex rel.*, 95 O. S. 232.

The Ohio Constitution accords finality only to awards for failure of compliance with a specific requirement. (Art. II, § 35, *post*, p. 45.)

> "* * * Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board and its decision shall be final * * *."

Even in such cases it is only the Commission's findings of facts which cannot be reviewed, and questions of law are reviewable.

Fassig v. State, ex rel., 95 O. S. 232, 242 (1917):

> "The action against the employer to recover the amount so ascertained and fixed must be brought in a court of general jurisdiction, and the defendant employer is entitled to a trial by jury. He is entitled to make the defense that he is not an employer of five or more employes, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was wilfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute."

Coal Company v. Industrial Commission, 108 O. S. 185 (1923), quoted *post*, p. 22; *Clemmer & Johnson Co. v. Industrial Commission*, 112 O. S. 421 (1925); *Slatmeyer v. Industrial Commission*, 115 O. S. 654:

> "2. Section 871-38, General Code, does not confer upon this court jurisdiction to review the decision of the commission in respect to the imposition of the added award. All questions relating to such additional award, save that upon which the decision of the commission is final, may be heard and determined in a single suit wherein the employer, when sued under § 1465-74, General Code, for the compensation fixed, may contest the basic legal questions necessary to be determined by the commission before making such additional award. (*Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St. 185, 140 N. E. 684; *Gatton v. Industrial Commission*, 93 Ohio St., 203, 112 N. E. 503; *Fassig v. State, ex rel. Turner, Atty. General*, 95 Ohio St. 232, 116 N. E. 104; and *DeWitt v. State, ex rel. Crabbe, Atty. General*, 108 Ohio St. 513, 141 N. E. 551, followed.)"

The court sustained a demurrer to a petition for review under G. C. § 871-38, of an added award for failure of compliance with a lawful requirement saying, among other things, in the opinion (656-658):

"The paramount question to be determined by this court is: To what extent is the commission's decision final respecting specific requirements, and does that finality of decision extend to both questions of fact and questions of law?

The language of the [constitutional] amendment is the pole-star of this interpretation. Under it the commission has been given full power and authority 'to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement.' We are of the unanimous opinion that upon that question of fact the decision of the commission is final; but its finality extends only to the determination whether, in fact, the injury, etc., resulted because of the failure to comply with such specific requirement. The state having created, under its Constitution, a board of awards for the determination of that question of fact, there is no violation of the due process clause in failing to provide a judicial review upon that specific feature. The Constitution has committed that question to the exclusive jurisdiction of the Industrial Commission, sitting as a board of awards.

Does the finality of the commission's decisions extend to questions of law, arising in a proceeding where an additional award is imposed for failure to comply with such specific requirement? In this respect *this court holds that it does not*. The language of the Constitution is plain. The commitment of finality extends only to the single question of fact to be heard and determined. While the *constitutional amendment* may have contemplated that the industrial tribunal could dispose of a question of fact as well as a court constituted for that purpose, it no doubt *recognized that upon legal, fundamental, or jurisdictional questions, action by a court would be necessary. At all events, no legal questions were committed by the Constitution to the final jurisdiction of the commission.* If the original award as well as the added per centum were both attacked by the employer, *there is no doubt that the employer would have the right to prove that*

the employe was not an employe, and that he was not injured at all, or, if injured, that it was by self-infliction, that *the injury did not arise within the course of his employment*; and, if successful in either, the basis of the employe's claim having failed, naturally the added per centum could not be imposed. However, if there was no attack by the employer upon the original award, but the attack was confined solely to the imposition of the added per centum, the constitutional amendment does not deny the right of the employer to question the added award upon jurisdictional, legal, or constitutional grounds. If * * * in any manner the jurisdiction of the commission in respect to a specific requirement were attacked, that as well as other legal questions would still remain within the jurisdiction of the courts for the purpose of review, and a denial of judicial process in those respects would be a denial of due process." (Emphasis ours.)

Wallpaper Company v. The Industrial Commission, 132 O. S. 372, 376 (1937):

"This holding makes it unnecessary to pass upon the merits of the case, although they have been argued by counsel. Suffice it to say that, if the action of the commission has been so discriminatory or arbitrary as to amount to a gross abuse of discretion or has deprived the plaintiffs of property without due recourse of law, there are judicial remedies available to them, other than that sought by this action, where such injustices may be corrected."

State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542 (1937):

"Although the constitutional amendment apparently permits the General Assembly to accord finality to the decisions of the Industrial Commission on questions of fact appertaining to the right of claimants to compensation, it has never been recognized that the intent of such amendment is to deprive an aggrieved party of his 'day in court' on questions of law. Compare *Slatmeyer v. Industrial Commission*, 115 Ohio St., 654, 115 N. E. 484; *Pittsburgh Coal Company v.*

Industrial Commission, 108 Ohio St., 185, 140 N. E. 684; 42 *Ohio Jurisprudence*, 700 § 108."

In its interlocutory opinion herein (142 O. S. 439, 444, R. 17), and again in its final opinion (143 O. S. 591, 595, R. 26-27), the Supreme Court of Ohio said that the complying employer is neither a necessary nor proper party to a proceeding under G. C. § 1465-90 for the allowance of compensation. The order awarding compensation being held to be final, appellant, as a contributing employer, is denied any hearing, judicial or otherwise. It is thereby denied due process of law and the equal protection of the laws as more fully hereinafter shown.

(2) The Court erred in holding that § 871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code.

It is believed that awards of workmen's compensation under the laws of all other states than Ohio are final only on questions of fact, and are subject to review in some form of judicial hearing, and that the Legislature of Ohio likewise intended to provide for review on questions of law. By G. C. § 871-38 (*post*, p. 47), a part of the Industrial Commission Act so-called, passed in 1913, it is provided without qualification that any employer, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio against the Commission as defendant to set aside, vacate, or amend any such order. It is to be noted that the relief under this section is not limited but applies to "*any employer*" and to "*any order of the Commission.*" By an anomaly in the development

of the construction of this section by the Supreme Court of Ohio, it was held that the section does not permit review of orders of the Commission awarding compensation under the Workmen's Compensation Act in cases where another form of review or attack is available, but that review under it is limited to orders of the Commission under favor of the Industrial Commission Act itself. (G. C. §§ 871-1 to 871-45 inclusive.) The effect of such construction in the instant case, we submit, plainly denies to appellant equal protection of the laws and deprives appellant of its property without due process of law, contrary to the provisions of the Federal Constitution.

Gatton v. Industrial Commission, 93 O. S. 203, 207. This was a suit by an employe to require an award of compensation under G. C. § 871-38; demurrer was sustained to the petition on account of the existence of a remedy by appeal under G. C. § 1465-90. The court said at page 207:

> "The proceeding authorized by this section [871-38] is manifestly one which calls in question the reasonableness or lawfulness of an order of The Industrial Commission touching the matters referred to in the preceding sections."

From this the Court went on to say that the right of action granted by this section is limited to orders of the Commission relating to the safety requirements, sometimes referred to as the "Safety Code," comprised in the Industrial Commission Act. That assumption is not well grounded. The provisions for safety requirements begin with G. C. § 871-22 in which it is provided in part that the Industrial Commission may establish a code prescribing hours of labor, safety devices, safeguards, and other matters relating to the safety of employes. The court, however, disregarded the provision of § 12 of the Industrial Commission Act (103 O. L. 97, 656; G. C. § 871-12, *post*, p. 46), under which the Industrial Commission superseded, and exercises all powers and duties cast by law upon, the

State Liability Board of Awards originally provided in the Workmen's Compensation Act (102 O. L. 524), which until that time had the sole authority to make awards of compensation. The Industrial Commission was created and enabled to exercise jurisdiction in matters under the Workmen's Compensation Act only by the Industrial Commission Act; orders awarding compensation are made by it under favor of G. C. § 871-12, one of the sections of the Industrial Commission Act preceding G. C. § 871-38, and are, therefore, "matters referred to in the preceding sections," in the language of the *Gatton* case, *supra*.

In the next decision, *Coal Company v. Industrial Commission*, 108 O. S. 185, plaintiff, a self-insuring employer, was held to have a complete and adequate remedy against an illegal award by refusing to pay, and setting up the illegality as a defense in a suit on the relation of the Attorney General for the collection of, such award; as had been done by a non-complying employer, sued for recovery of an award of compensation and penalty in *Fassig v. State ex rel., supra*. We quote from *Coal Company v. Industrial Commission, supra*:

> "2. Section 27 of the Workmen's Compensation Act (Section 1465-74, General Code), enacted in 103 Ohio Laws, 82, provides an adequate remedy by due course of law, whereby an employer, when sued for the compensation fixed, may contest all jurisdictional facts necessary to be determined by the Commission before making an award for compensation."
>
> (p. 190) "Any defense that the employer may have touching the right of the claimant to participate may be made in an action brought in the name of the state for the benefit of the person entitled to the compensation. This view was expressed in the case of *Fassig v. State*, 95 Ohio St., 232, at page 242, 116 N. E., 104, at page 107, wherein the opinion states that, in an action so brought against the employer to recover the amount so ascertained and fixed, the defendant employer is

entitled to a trial by jury, and is 'entitled to make the defense that he is not an employer of five or more employes, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was willfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute.' In this connection it might be stated also that the employer could make the defense that the death did not, in fact, result from the injuries alleged to have been sustained."

Probably actually contrary is the decision in *Clemmer & Johnson Co. v. Industrial Commission*, 112 O. S. 421 (1925) in which a petition of an employer for review under G. C. § 871-38 of an order of the Commission granting an additional award for breach of a lawful requirement was held not demurrable, upon the stated ground that the additional award depended upon a safety requirement established by order which had not been in effect for the required thirty days prior to the accident, the court reasoning that the review was of the legality of the order for the lawful requirement, rather than of the award based thereon. We quote from the opinion (p. 426):

"Under the facts in *Gatton v. Industrial Commission*, 93 Ohio St., 203, 112 N. E. 503, and *Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St., 185, 140 N. E. 684, this Court reached the conclusion that its jurisdiction was not sufficient, under § 871-38, General Code, to permit those actions to be maintained, the plaintiffs having other remedies, but in this case what is here complained of is the unlawfulness of the order of the Commission with respect to the specific requirements as applied to the plaintiff, and this order of the Commission was adopted by virtue of the authority vested in it under §§ 871-22, 871-25, 871-26 and 871-34, General Code, all of which precede § 871-38." (Emphasis ours.)

(pp. 427-428):

"The plaintiff here is not seeking a review of the award of compensation under the Workmen's Compensation Act, as provided by § 1465-37 *et seq.* To review such questions other remedies are provided, as is held in *Pittsburgh Coal Co. v. Industrial Commission, supra,* but the sole and only question involved in this action relates to whether or not the order of the Commission in respect to the specific requirement was unlawful for the reason that the same did not become effective until after the period of 30 days from its publication, as provided in § 871-26; the contention being a claimed violation of the Industrial Commission Act and not of the Workmen's Compensation Act."

* * * * *

"Entertaining the view that this Court has jurisdiction to hear and determine the lawfulness of the order of the Commission, made and attempted to be enforced under the provisions of the Industrial Commission Act, and that the order in question was not lawful, it follows that the demurrer to the petition must be overruled."

This reasoning is indeed strained. Under the law in effect at the time of that decision, proceedings to reverse, vacate or modify a judgment of final order could not be commenced unless within seventy days after the entry of the judgment or order complained of. (former G. C. § 12270.) This was not a mere limitation, but a matter of jurisdiction—*McGuire v. Ranney*, 49 O. S. 372; *Young v. Shallenberger*, 53 O. S. 291. From the files in the *Clemmer & Johnson* case it appears that the order establishing the safety requirement, the invalidity of which was the stated basis of the decision, had been entered by the Industrial Commission December 26, 1923. The date of the injury involved was January 11, 1924; the award of compensation was made June 17, 1924; an application for rehearing was filed July 16 and denied November 18, 1924; and the petition was not filed in the Supreme Court until December

18, 1924, almost a year after the time of the entry of the invalid order establishing a safety requirement. It is therefore submitted that Chief Justice Marshall, dissenting in *Slatmeyer v. Industrial Commission*, 115 O. S. 654, 675, was correct in saying that this decision declared the right of direct review by the Supreme Court of an award of compensation.

In *Slatmeyer v. Industrial Commission, supra*, the employer attempted to procure review of an additional award for breach of a lawful requirement; but the court held that all legal questions could be set up and determined by way of defense in a suit under G. C. § 1465-74. (See *ante*, pp. 17-19.)

While the holding of the Supreme Court of Ohio, that G. C. § 871-38 is inapplicable to permit review of orders of the Industrial Commission awarding compensation, is not unconstitutional where other methods of review or attack upon the legality of the awards are available, the limitation of review of "any order" to orders of the Commission under preceding sections of the Act can not logically exclude orders by virtue of Section 12 of the Act which gave the Commission jurisdiction formerly exercised by the State Liability Board of Awards under the Workmen's Compensation Act.

(3) The Court erred in holding that when an order of the Industrial Commission awarding workmen's compensation is challenged on the ground that the injuries or death for which claims are allowed are not compensable, employers contributing to the state insurance fund, whose premiums will be increased thereby, are not entitled to relief by way of extraordinary remedy.

The Workmen's Compensation Act nowhere provides any method of review or other relief against an order of the Commission ordering payment from the state insurance fund of claims for compensation unsupported by evidence

of facts required by the statute as a basis for the proceedings, or where as in the claims here involved the evidence affirmatively shows that the injuries and deaths did not arise in the course or out of the employment. Since such orders are held to be final under G. C. § 1465-90 and not subject to review under G. C. § 871-38, although the orders were void, appellant had no remedy in the ordinary course of law. The only relief then available is an extraordinary remedy at law, i.e., prohibition from continuing the orders awarding compensation in effect, from making any payments of compensation thereunder, and from taking into consideration any payments which may have been made thereunder in the rating of appellant's workmen's compensation risk, or mandamus requiring the defendant to vacate such orders and disallow such claims.

Prohibition may be invoked against an inferior court or tribunal, ministerial or otherwise, that possesses incidental judicial or quasi-judicial powers to keep such court or tribunal within the limits of its own jurisdiction. *Nolan v. ClenDening*, 93 O. S. 264. The opinion in that case at 271 quotes from *High on Extraordinary Legal Remedies*, §§ 764a, 781, in part, as follows:

> "And the remedy may be invoked against any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a court."
>
> "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it is extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers." (Section 781.)

State, ex rel. McCrehan v. Brown, 108 O. S. 454.

State, ex rel. Shorr v. Viner, 119 O. S. 303. In that case prohibition was allowed on the relation of the attorney and legal counsel for the Board of Rapid Transit Com-

missioners of a city against proposed action of the Civil Service Commission of that city to forfeit relator's position by reason of political activity, under a provision of the municipal charter applying to persons in the administrative service, it being held that the relator was not in the administrative service of the city.

State, ex rel. Pavlowicz v. Edy, 134 O. S. 389;
State, ex rel. Arey v. Sherrill, 142 O. S. 574.

We quote from the Dissenting Opinion in the case at bar (R. 33):

> "The functions of the commission in granting awards to claimants and in fixing premium ratings are quasi-judicial. We have held upon numerous occasions that a writ of prohibition is the appropriate remedy to keep administration tribunals within the limits of their jurisdiction."

The Industrial Commission is an administrative tribunal; the claims upon which its orders were based were in excess of its jurisdiction; and it should be prohibited from making them effective. In *State ex rel. Wolf Run Coal Co. v. Industrial Commission,* 110 O. S. 487, prohibition was allowed against consideration of a claim barred by election, under the law in effect at that time, to sue for damages at common law instead of claiming workmen's compensation.

Mandamus lies to compel the performance by a public board or officer of a clear legal duty; and the Commission, having entered void orders in excess of its jurisdiction, clearly should be required to vacate them.

Of the two remedies, prohibition and mandamus, it would seem that prohibition is by its nature more appropriate. Both are extraordinary legal remedies and require that there be no adequate remedy in the ordinary course of law—*State ex rel. v. Mills,* 103 O. S. 172; *State ex rel. v. Zangerle,* 126 O. S. 118; *State ex rel. v. Industrial Commis-*

sion, 127 O. S. 583. The court below has made plain that there is no remedy in the ordinary course of law.

In the interlocutory opinion (142 O. S. 439, syl. 2, 444, R. 12, 16), the court below begged the question, saying that prohibition will not lie to prevent the enforcement of a lawful or valid award made pursuant to G. C. § 1465-90 upon claims properly before it; and in its final opinion (143 O. S. 591, syl. 2, R. 23), that when such an order is challenged only on the ground that the claims are not compensable, the employer is not entitled to relief by way of extraordinary remedy. But where, as we have seen, the claims are not compensable for the reason that the injuries did not arise in the course or out of the employment, the claims were not within the authority of the Commission and the awards were not made pursuant to but in spite of G. C. § 1465-90, are not valid or lawful but are beyond the jurisdiction of the Commission (*supra,* pp. 12-17).

The court below, in its interlocutory opinion (142 O. S. 439, 444-445, R. 17), is concerned lest the recognition of the employer's constitutional rights operate to deny the statutory right of the claimant to rehearing under G. C. § 1465-90. If true, that would not be a valid argument in favor of denying appellant any relief, but merely an argument for the unconstitutionality of the Act as applied to employes as well as to contributing employers. However, it is submitted that such would not be the effect. In Ohio, at least, the extraordinary writ of mandamus will not lie until the board or officer has had full opportunity to perform his duty (*Wapakoneta v. Helpling,* 135 O. S. 98, 103), and writs of prohibition will not ordinarily be allowed until the question of jurisdiction has been made and overruled in the court or tribunal whose jurisdiction is challenged. (*Ex Parte Oldham,* 2 O. App. 457, 459; *State, ex rel. v. Geiger,* 38 O. App. 253, 256.) Accordingly the employe is granted a hearing, and only if jurisdiction is unlawfully sustained and the claim allowed by the Com-

mission would prohibition be required. A writ of prohibition might well be limited in its effect to the particular hearing and not prevent a rehearing. On the other hand, if the Commission holds that it has not jurisdiction, then there is no occasion for the employer to seek prohibition and the claimant will not be denied his right of rehearing under G. C. § 1465-90, or his right of appeal therefrom. Of course he cannot complain if he does not have a full trial on appeal from rehearing. Verdict is frequently directed for defendant at the close of plaintiff's case for failure to make out a case.

In the interlocutory opinion (142 O. S. 439, syl. 3, 444, R. 13, 16) the court below recognized that mandamus will lie to compel the performance of a duty specially enjoined by law where failure to perform results from abuse of discretion, violation of law, or otherwise, even though the employer is not a party to the claim proceedings, and went on (R. 17) to say that the petition does not set up any abuse of discretion on the part of the Commission or facts to show that the orders were void, or invalid by reason of any statutory provision. The court thereby ignored the allegations of the petition (R. 6-7), that the orders are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority of the Commission, and are beyond the jurisdiction of the Commission. The words "if any" were used advisedly in the petition since it is doubtful that the Commission has any discretion under G. C. §§ 1465-90, 1465-68, and 1465-72, to allow claims for injuries and deaths which did not arise in the course or out of the employment.

It is therefore submitted that the court erred in holding that appellant, an employer contributing to the state insurance fund, is not entitled to relief by way of extraordinary remedy.

(4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

The case at bar is typical of the situation to which it is believed the framers of the Constitution primarily intended the due process clause of the 14th Amendment to apply—the denial of a judicial hearing or remedy. Administrative orders of a judicial or quasi-judicial nature are void if a judicial hearing is denied, if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, if the facts found do not as a matter of law support the order made. *Interstate Commerce Com. v. L. & N. R. R. Co.*, 227 U. S. 88, 91; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287; *The Chicago Junction Case*, 264 U. S. 258; 44 S. Ct. 317; *Northern Pac. Ry. Co. v. Dept. of Public Works*, 268 U. S. 39. Appeal (or writ of error) was allowed in these cases.

The plight of appellant in this regard, under the decision below, is well stated in the dissenting opinion, 143 O. S. 596, 599-600 (R. 30):

> "*Class No. 1 Complying Employers*—Where an employe of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insur-

ance Fund. The employer has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the premium which the complying employer must pay for the ensuing years. The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain."

It is not necessary to go beyond the decisions of the Supreme Court of Ohio to demonstrate that such a denial of any review or remedy to resist an unlawful award is a denial of due process.

Fassig v. State ex rel., supra, pp. 13, 17.

Coal Company v. Industrial Commission, 108 O. S. 185, 189:

"Plaintiff further complains that the Ohio Workmen's Compensation Law deprives it of the guaranties of the equal protection and due process clauses of the federal and state Constitutions. Section 1, Article XIV, of the former, provides that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, while Section 16, Article I, of the Ohio Constitution, provides that all courts shall be open to every person for an injury done him, and he shall have remedy by due course of law.

It is argued that Section 1465-90, General Code, deprives the plaintiff of these guaranties. This section is part of the Workmen's Compensation Act, gives full power and authority to the Commission to determine all questions within its jurisdiction, and stipulates that its decisions shall be final, with the proviso that 'in case the final action of such Commission denies the right of the claimant to participate at all or to continue to participate in such fund on the ground that the injury was self-inflicted or on the ground that

the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right,' the employe claimant has a right to appeal to the common pleas court for a trial of those issues going to the basis of the claimant's right to compensation. Neither this nor any other section, however, gives the right of appeal to the *employer* should the decision of the Commission be adverse to it."

"In the Ohio act the Industrial Commission grants an award to the employe in stipulated statutory amounts, depending upon death or disability. The amount of such compensation ascertained by the Commission must be paid by the self-insured employer within 10 days after receiving notice. Were Section 1465-90, General Code, the sole one under consideration, the plaintiff employer might urge that it neither had the equal protection of the law nor a remedy in due course, since that section grants the employe an appeal to a judicial tribunal in case the Commission denies his right to participate, and provides no remedy for either appeal or review upon the part of his employer. However, in our view, Section 27 of the Workmen's Compensation Act (Section 1465-74, General Code), enacted in 103 Ohio Laws, 82, provides an ample and adequate remedy to the employer on all jurisdictional facts, which the Commission must first determine before making an award for compensation."

Slatmeyer v. Industrial Commission, 115 O. S. 654, 658:

"If the added per centum were imposed where no specific requirement was 'enacted by the General Assembly or in the form of an order adopted by such board,' manifestly the commission's finding of failure to comply would be illegal; or if in any manner the jurisdiction of the commission in respect to a specific requirement were attacked, that as well as other legal questions would still remain within the jurisdiction of the courts for the purpose of review,

and a denial of judicial process in those respects would be a denial of due process."

Wallpaper Company v. Industrial Commission, supra:

(p. 376) "This holding makes it unnecessary to pass upon the merits of the case, although they have been argued by counsel. Suffice it to say that, if the action of the commission has been so discriminatory or arbitrary as to amount to a gross abuse of discretion or has deprived the plaintiffs of property without due recourse of law, there are judicial remedies available to them, other than that sought by this action, where such injustices may be corrected."

State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542:

"Although the constitutional amendment apparently permits the General Assembly to accord finality to the decisions of the Industrial Commission on questions of fact appertaining to the right of claimants to compensation, it has never been recognized that the intent of such amendment is to deprive an aggrieved party of his 'day in court' on questions of law. Compare *Slatmeyer v. Industrial Commission*, 115 Ohio St., 654, 115 N. E. 484; *Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St., 185, 140 N. E., 684; 42 *Ohio Jurisprudence*, 700, Section 108."

By virtue of the Workmen's Compensation Act (G. C. §§ 1465-53, 1465-54), the Industrial Commission classifies occupations and industries with respect to their degree of hazard, determines the risks of the different classes, and fixes rates of premium, and likewise has adopted and applies formulae for the rating of risks, predicated upon the basis of individual industrial accident experience. We have no quarrel with the classifications and rating systems and formulae adopted by the Industrial Commission when they take into consideration awards of compensation properly chargeable to the industry as a whole and to appellant as an individual employer, and do not include

awards of compensation for non-compensable claims which it was beyond the jurisdiction of the Commission to allow. Appellant is one of the smaller rolling mill operators in Ohio, and one of the few which has not qualified as a self-insurer. During the five-year period ended December 31, 1942, in which the plaintiff was in operation less than 3¼ years, its payroll aggregated ($10,082,517) about 90% of that of all contributing employers in the same classification ($11,214,000), and the workmen's compensation premiums paid by it ($60,939) were over 72% of those paid by all contributing employers in that classification ($83,900); consequently its experience in the matter of claims was dominant in the determination of basic rates for the industry, as well as its own merit rating. The basic rate of the industry was 80¢ per $100.00 of payroll, against which it had a merit rating credit of 26¢, or a net rate of 54¢ because of its favorable accident experience; but by reason of the claims in question, the basic rate was increased to $1.00 and appellant's merit rating credit was eliminated, resulting in an aggregate increase of $20,018.62 for the year 1943 over the premiums which would have been charged to and paid by it were it not for the claims involved herein; and the claims in question will continue adversely to affect the basic and merit ratings of appellant during the full five-year period, in amounts not ascertainable in advance by reason of other varying factors entering into the formulae (Amendment to Petition, R. 21-22). That it was thus deprived of property without due process needs no further demonstration. The effect of the judgment below is well stated in the dissenting opinion (143 O. S. 596, 601, R. 32):

> "It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should

be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer should be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law."

The court below (142 O. S. 439, 442, R. 15) cited *U. S. Wallpaper Company v. Industrial Commission*, 132 O. S. 372, 7 N. E. 2d 798, holding that an employer has no right to have an order fixing a premium rate reviewed, and (143 O. S. 594, R. 26), *State, ex rel. Powhatan Mining Company v. Industrial Commission*, 125 O. S. 272, denying a writ of prohibition against the application of the merit rating provisions of G. C. § 1465-54, and said that the employer is not aggrieved until the Commission applies the merit rating system (R. 27). It would then be too late. We concede that the rules and formulae for classification and rating of risks are neither unreasonable nor arbitrary, and therefore that orders establishing premium rates are not subject to review nor prohibition; that would be a collateral attack upon the excess of jurisdiction and unlawfulness of the awards which were directly attacked by our petition below.

The court below in its final opinion (143 O. S. 591, 593, R. 25) cited *State, ex rel. Williams v. Industrial Commission,* 116 O. S. 45, in which a majority of the court dissenting (p. 48) voted against the constitutionality of G. C. § 1465-75 as then in force, on the ground that the statute, by providing for payment out of the surplus fund of compensation awarded to an employe of an insolvent non-complying employer, amounted to a denial of due process, although such payment resulted in only an insignificant discrimination against employers contributing to the state insurance fund, and although no contributing employer was there complaining (p. 55).

It is suggested in the majority opinion on final judgment (143 O. S. 591, 596, R. 28) that appellant could have refused to pay a premium assessed against it, and, upon suit to recover the premium, make its defense, if any it has. To do so, however, appellant would necessarily have become a non-complying employer in violation of law, thereby losing the protection of the Workmen's Compensation Act against suits at common law for injuries to its employes and the defenses of the fellow servant rule, assumption of risk, and contributory negligence (G. C. § 1465-73, *post*, p. 53), and subjecting itself to civil action, requirement of bond, and appointment of a receiver of its business (G. C. § 1465-75, *post*, p. 56), and itself or its officers personally to criminal liability for fine and imprisonment. (G. C. § 1465-69a.) To require that appellant default in payment of future premiums in order to test the validity of the awards included in computation thereof, foregoing the protection of the act against suits at common law and subjecting itself and its officers to the other penalties of G. C. §§ 1465-69a, 1465-73, 1465-75 would deny due process. *Cotting v. Kansas City Stockyards Co.,* 183 U. S. 79; *Ex parte Young,* 209 U. S. 123; *Wadley Southern Ry. Co. v. Georgia,* 235 U. S. 651, 661; *Santa Fe Pac. R. R. v. Lane,* 244 U. S. 492; *DeWitt v. State,* 108 O.

S. 513, 531, 533—(Opinion of five judges dissenting from the opinion of two judges prevailing under the constitutional rule in Ohio requiring the concurrence of all but one of the judges in such a case.) In the last cited case the court quoted among others from *Wadley Southern Ry. Co. v. Georgia, supra,* at page 531:

> "But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

We quote further (page 533):

> "Five members of this court, viz., Marshall, *C. J.*, Robinson, Jones, Matthias and Day, *JJ.*, therefore hold that the clause contained in Section 1465-74, General Code, imposing a 50 per cent. penalty in addition to the statutory award, tends to compel obedience to the administrative orders of the Commission and operates as a deterrent upon an employer who may desire, in good faith, to test the validity of such orders, and, to that extent, transcends legislative power and violates the equal protection and due process clauses of the state and federal constitutions."

See also the dissenting opinion below in the case at bar. (R. pp. 32-33) from which we quote in part (R. 33):

> "Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall 'forthwith institute a civil action against the employer.' Such employer is granted ten days to answer and to execute a bond in double the amount claimed, with sureties satisfactory to the commission, conditioned that he or it will pay any judg-

ment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

"If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium. * * *

"In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law."

(5) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not denied the equal protection of the laws by the denial of any judicial hearing on, review of, prohibition, mandamus or other relief against orders of the Industrial Commission awarding workmen's compensation for injuries and deaths which are not legally compensable; although employers against whom awards are made for the payment of workmen's compensation otherwise than from the state insurance fund (self-insuring employers and employers who in violation of law are non-complying) may attack the legality of such orders by setting up any defense other than a question of fact in suit for the collection of such awards under the Workmen's Compensation Act. (G. C. § 1465-74.)

The unconstitutionality of the Workmen's Compensation Law, so interpreted as to require appellant to pay workmen's compensation premiums greatly in excess of those which would be charged if it were permitted to show the lack of jurisdiction to make some of the awards entering into the computation of rates and premiums, is even more striking when we consider that employes are granted the right of appeal from orders denying compensation (G. C. § 1465-90; that employers strong enough, and large enough to make it safe and desirable, to qualify as self-insurers, have full opportunity to attack any award of compensation to any of their employes upon any legal ground; and especially in comparison with the employer who, in defiance of the Act, neither qualifies as a self-insurer nor contributes to the state insurance fund, but, nevertheless, is afforded the same opportunity as a self-insurer to attack any award of compensation to any of its employes upon any legal ground by defense to a suit under G. C. § 1465-74. *Fassig v. State, ex rel., supra*, p. 17; *Coal Company v. Industrial Commission, supra*, pp. 17, 22, 31; *DeWitt v. State, ex rel., supra*, pp. 36-37; *Clemmer & Johnson v. In-*

dustrial Commission, supra, p. 23; *Slatmeyer v. Industrial Commission, supra*, pp. 17, 25; *State, ex rel., Slaughter v. Industrial Commission, supra*, p. 19. See also the dissenting opinion in the court below. (143 O. S. 596, R. 28-34.)

This argument was applied to the converse situation in the opinion in *Coal Company v. Industrial Commission*, 108 O. S. 185, 188, in reference to G. C. § 871-38:

> "The principle is analogous here. Since the employe may not avail himself of that section, as a 'person in interest,' to test the legality of an award made him by the Commission, the employer has not the right to invoke the jurisdiction of this Court for the same purpose. In the *Gatton* case we sustained the demurrer to the original petition, for the reasons stated, and we now adhere to the decision then made."

The employe has a right of appeal under G. C. § 1465-90; self-insuring and non-complying employers have a remedy under G. C. § 1465-74; only the employer contributing to the state insurance fund is without remedy. The denial of equal protection of the laws is self-evident.

(6) The court erred in holding that the appellant has no direct financial interest in the distribution of the state insurance fund, although by the allowance of claims for injuries and deaths which are not compensable and the payment of such awards from the state insurance fund, premiums charged and required to be paid by appellant for workmen's compensation will be greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

The Supreme Court of Ohio, in its interlocutory opinion (142 O. S. 439, 444, R. 16, 17), and again in the majority opinion on final judgment (143 O. S. 591, 595, R. 26-27), has said that appellant as a complying employer is neither a necessary nor proper party to the proceeding under G. C. § 1465-90 for the allowance of compensation; that its

direct financial interest is not in the distribution of the fund or in the fund itself but in the creation of it, i.e., in the amount of premiums it pays in the future.

Strictly speaking, the court is perhaps correct in saying that appellant was not a necessary or proper party to the proceedings before the Commission, but if so, the resulting denial of its constitutional rights is thereby emphasized. To be sure, it has no legal interest in the state insurance fund itself, but it certainly has an interest in the distribution of the fund under unlawful awards of compensation to its employes; for such awards, unless held void and beyond the jurisdiction of the Commission, will necessarily be taken into consideration in fixing the basic premiums for the industry and in its individual merit rating. The majority opinion (143 O. S. 591, 594, R. 26) has cited the case *State ex rel. Powhatan Mining Company v. Industrial Commission*, 125 O. S. 272, in which the merit rating system adopted by the Commission was upheld as not based upon an unreasonable or arbitrary classification. That decision demonstrates the fallacy of the reasoning of the majority opinion below (143 O. S. 591, 595, R. 27) that the contributing employer has no interest in the distribution of the state insurance fund or in the fund itself, but only in the creation of it, and that it is not aggrieved if at all, by the unlawful allowance of a claim for compensation, or until the Commission has applied its merit rating system, a system against which, of course, no arguments can be invoked. Obviously, when the Commission makes a void award beyond its jurisdiction, the order should be attacked directly and at once rather than collaterally when the Commission later computes the rates of premium to be charged the industry and the individual employer; and, as stated above, we have no complaint against the methods of classification and rating or of individual merit rating where only lawful awards of compensation enter into the computations.

We have quoted (*supra*, p. 30) under the caption dealing with due process the analysis of the dissenting opinion relating to the situation of complying employers. We quote here the comparison in the same opinion of employers who do not comply and self-insuring employers (R. 31):

> "*Class No. 2 Non-complying Employers*—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense be established the non-complying employer is not required to pay for the death or injury of such employee.
>
> "*Class No. 3 Self-Insurers*—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.
>
> "It is self-evident that the non-complying and self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation."

It is not necessary to the denial of due process or equal protection of the laws that appellant have a legal interest in the state insurance fund or that it be a necessary or proper party to proceedings before the Industrial Commission, since the operative effect of the Act, the orders of the Commission, and the decision of the court below is to deprive appellant of property without due process. *Voeller v. Warehouse Company,* 136 O. S. 427.

(7) The Court erred in its final judgment of July 19, 1944, sustaining the general demurrer to the petition and amendment thereto and entering judgment for the appellee.

Since the Supreme Court of Ohio, in its judgment of July 19, 1942, necessarily construed and applied the Workmen's Compensation Act so as to deprive appellant of property without due process of law and deny it the protection afforded by the laws to employes and to employers not contributing to the state insurance fund, whether self-insurers or non-complying employers violating the law, this assignment of error follows as a necessary conclusion to those hereinbefore discussed.

(8) The State of Ohio, by the Workmen's Compensation Act, the decision and judgments of the Court, and the orders of the Commission involved herein, has deprived appellant of property without due process of law and has denied it the equal protection of the laws.

We have herein treated the errors of the Supreme Court of Ohio as a basis for strict appeal under U. S. C. Title 28, § 344(a), i.e., we have directed our discussion to the point that the court, by its decision applying the Workmen's Compensation Act of Ohio, necessarily held that act valid and not repugnant to the Constitution although it so construed the act as to deny appellant due process of law and the equal protection of the laws. Likewise the deci-

sion and judgment of the court and the orders of the Commission deprived appellant of property without due process of law and denied it the equal protection of the laws—errors available as a basis for certiorari, under U. S. C. Title 28, § 344(b) and (c), without regard for the question whether the Workmen's Compensation Act was held valid and not repugnant to the Constitution.

CONCLUSION.

In conclusion, it is submitted that the State of Ohio by the Workmen's Compensation Act as construed and applied in the court below, by the orders of the Industrial Commission, and by the judgment of the Supreme Court, has deprived appellant of property without due process of law and has denied it the protection afforded by the law to employees, to self-insuring employers, to non-complying employers in violation of the Act and to employers against whom additional awards are granted for breach of lawful requirements and, accordingly, that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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